IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IU NORTH AMERICA, INC.	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
THE GAGE COMPANY	:	
	:	
Defendant.	:	**NO. 00-3361**

M E M O R A N D U M

Reed, S.J. **July 1, 2002**

This action concerns the proper allocation of liabilities for asbestos personal injury claims between the buyer and seller of a corporate sale of a business. Presently before the court is the motion of defendant The Gage Company for leave to file a counterclaim naming Envirosource, Inc. ("Envirosource") as a third-party defendant (Document No. 28) pursuant to Federal Rules of Civil Procedure 14, 15, 18 and 19. Upon consideration of the motion, response, reply, sur-reply and supplemental briefs thereto, and for the reasons which follow, the motion will be denied.[1]

I. Background

In 1979, Robert Chute ("Chute") formed The Egag Company for the purpose of purchasing The Gage Company business. The sale took the form of an asset purchase and included the right to use the "Gage" name. On May 31, 1979, the business sale closed. Thereafter, Chute changed the name of The Egag Company to The Gage Company of Delaware ("Gage Delaware"). On August 22, 1980, Gage Delaware was merged into the newly formed The Gage Company ("Gage"), which is the defendant in this action ("Gage" or "New Gage").

[1] Jurisdiction is proper pursuant to 28 U.S.C. § 1332, as there is complete diversity among the parties and the amount in controversy exceeds $75,000, exclusive of costs and interest.

After the close of the business sale, the company formerly known as The Gage Company changed its name to the Garp Company, which was owned by IU North America, Inc. ("IUNA"). Sometime thereafter, the Garp Company merged with IUNA, which is the plaintiff in this action ("IUNA" or "Old Gage").

Prior to the business sale, Old Gage owned and operated an industrial supply distribution business. (Compl. ¶ 9.) After the business sale, New Gage continued to sell at least some of the same industrial supplies, (Second Am. Answer ¶ 19), though the record does not contain precise information with respect to which products remained in distribution, nor the duration of time those products continued in distribution. In the 1980s, individuals began to bring personal injury claims allegedly due to exposure to asbestos from products sold by Old Gage and New Gage. This lawsuit concerns the allocation of the liabilities for those underlying asbestos claims.

Nearly one month after the parties filed cross motions for summary judgment on the issue of liability and nearly six months after the deadline for adding additional parties, Gage filed the present motion, claiming that during the course of discovery Gage learned that IUNA is actually the "alter ego" of Envirosource. Gage further believes that Envirosource exercises exclusive control of IUNA and has begun to deplete IUNA of its insurance assets.

Neither party requested or suggested that the June 17, 2002 trial should be delayed to accommodate the proposed late addition of Envirosource. Accordingly, shortly before the trial was scheduled to begin, this Court ruled on the cross motions for partial summary judgment and declared that IUNA was responsible for all past, pending and future asbestos personal injury cases brought against "The Gage Company" (or variation of such name) in which the injury is or was based exclusively upon exposure to asbestos containing products which were sold by IUNA.

This Court further declared that Gage was responsible for those cases resulting from products sold by Gage. At the request of this Court, the parties provided supplemental briefing on how the court's summary judgment adjudication impacts the present motion.

II. Analysis

I begin by explaining the proper Federal Rule of Civil Procedure which is implicated in this case. Gage filed its motion pursuant to Rules 14, 15, 18 and 19. IUNA responded that Rule 13(h) governs this motion. Gage appears to agree that Rule 13(h) is the dispositive rule. At the same time, both parties applied the standard which accompanies Rule 15(a). Rule 13(h) is entitled "Joinder of Additional Parties" and provides: "Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with Rules 19 and 20." Rule 19 concerns joinder of persons needed for just adjudication, a phrase which is rooted in the now outdated language of necessary and indispensible parties. Rule 20 concerns permissive joinder. Thus Rules 13(h), 19 and 20 address issues of joinder.

Gage has filed what it entitles "Motion for Leave to File a Counterclaim naming Envirosource, Inc. as a Third-Party Defendant." There is no Federal Rule of Civil Procedure which allows for this procedure. Rather, what Gage is attempting to accomplish is to amend its pleading, specifically its counterclaim, to add Envirosource as an additional party. This is accomplished through Rule 15(a) which allows a party to add an additional party by amending its pleading with leave of court; the Rule commands that such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). See also Technology Based Solutions, Inc. v. Electronics College Inc., 168 F. Supp. 2d 375, 382 (E.D. Pa. 2001); Derzack v. County of Allegheny, 173 F.R.D. 400, 419 (W.D. Pa. 1996), aff'd, 118 F.3d 1575 (3d Cir. 1997); Wolfson

v. Lewis, 168 F.R.D. 530, 533 (E.D. Pa. 1996); 6 Charles Alan Wright, et al. Federal Practice and Procedure § 1474 (2d ed. 1990) (explaining types of amendments permitted under Rule 15(a)).

District courts may deny leave where a party's delay in seeking an amendment is undue, motivated by bad faith or prejudicial to the opposing party. See Cureton v. National Collegiate Athletic Ass'n, 252 F.3d 267, 273 (3d Cir. 2001). While leave may not be denied solely on the ground of delay, "at some point, the delay will become undue, placing an unwarranted burden on the court, or will become prejudicial, placing an unfair burden on the opposing party." Id. (quoting Adams v. Gould Inc., 739 F.2d 858, 863 (3d Cir. 1984)) (quotations omitted). Thus, while the rule is to be granted liberally, the issue of undue delay mandates that the court examine the movant's reasons for that delay. See id. In addition, leave may be denied solely for substantial or undue prejudice. See id. This factor focuses on the hardship of the opposing party if the amendment were allowed and includes considerations such as additional discovery, cost, and preparation to defend against new facts or new theories. See id.

I begin with the question of whether Gage engaged in undue delay. On September 6, 2001, this Court issued a case management order which provided that: "Except for good cause shown, no additional parties may be joined after October 1, 2001." (Document No. 16.) This motion was filed nearly six months later. Gage alleges that in January of this year it learned that Envirosource, which in around 1989 had assumed the duty to defend Gage in the underlying asbestos cases, had failed to have Gage's name written onto any of the settlement releases that counsel for Envirosource had purportedly executed on Gage's behalf. Gage further contends that it was not until this discovery that Gage became compelled to investigate whether IUNA was

equipped to satisfy a potential judgment and whether IUNA was likely to be in existence for the foreseeable future so as to satisfy the potential future accrual of damages. Gage contends that immediately after the January discovery, it began to so investigate.

The weakness in Gage's argument is that much of the evidence that it relies upon to show its belief that IUNA is actually the "alter ego" of Envirosource is documents or events that occurred well before January, 2002. In the first place, according to Gage, Envirosource was handling the litigation since around *1989*. In addition when the parties attended their first mediation in this case, on October 19, 2001, IUNA was represented by the CFO of Envirosource and the Assistant Counsel to Envirosource. Gage also relies on a statement in Envirosource's most recent SEC Form 10-K which was filed on March 23, 2001, which is nearly a year before Gage filed the present motion. (Document No. 28, Ex. 1.) It further relies on IUNA's Delaware Annual Franchise Tax Reports, the most significant of which is the drop in total gross assets from 1999 to 2000. (Document No., 36, Ex. A.) This information was surely attainable well before this motion was filed. This Court is unpersuaded by Gage's argument that its actions have not amounted to undue delay because it was not until January of this year that Gage learned that it should examine whether Envirosource should be added as a party to its counterclaim. To the contrary, as produced by Gage itself, there was adequate information which was accessible to Gage and would have put them on notice of Envirosource's relationship with IUNA.

More important than the undue delay analysis, however, is the prejudice analysis. Gage takes the position that while it should be afforded the opportunity to add Envirosource as a party, such an addition would not require any delays. This position frankly flies in the face of the reality of the allegations made by Gage. Adding Envirosource as a party would indeed require

additional discovery, cost and preparation by creating new issues of law and fact. Envirosource was not expressly a part of the discovery which closed on December 14, 2001. It was not expressly given an opportunity to test Gage's claims and to establish an evidentiary record of its own in opposition to the counterclaims. In addition, the alter-ego issue is completely divorced from the original claims and counterclaims and therefore requires wholly different discovery and case theory development.

Gage originally argued that Envirosource would not be prejudiced by being a party of Phase I of the case, which governed liability, because Envirosource, and not IUNA, has been controlling the litigation. Gage later changed its position and argued that it was not seeking to add Envirosource as a party to Phase I, but only Phase II, which governs damages, and that Envirosource would not be prejudiced because it would have a full and fair opportunity to defend against the claim in Phase II. Gage essentially argues that as long as Gage proves its contention that Envirosource, and not IUNA, has been directing the plaintiff's litigation, it will have shown that Envirosource was not in any way prejudiced by being added as a late party since it was really a party all along. In the converse, if Gage is not able to establish its allegations, Envirosource will be dismissed as a party and therefore not prejudiced.

This Court is not so persuaded. Not only would Envirosource clearly be prejudiced by its exclusion in Phase I, but IUNA would likewise be prejudiced by additional discovery, cost, and preparation to defend against the new facts or new theories at this late stage. In addition, this prejudice has obviously increased now that this Court has already ruled on the issue of liability. See Cureton, 252 F.3d at 273.

I therefore conclude that, without having to reach the issue of whether Gage acted in bad

faith, it has indeed unduly delayed the filing of this motion, and both Envirosource and Gage would be prejudiced if the motion were granted to add Envirosource as a party at this stage of the litigation. Gage has likewise not shown good cause for its actions as required by this Court's Order of September 6, 2001.

III. Conclusion

Based on the foregoing, this Court concludes that the motion to add Envirosource as an additional party in this litigation will be denied pursuant to Federal Rule of Civil Procedure 15(a). An appropriate Order follows.

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O R D E R

AND NOW this 1st day of July, 2002 upon consideration of the motion of defendant The Gage Company for leave to file a counterclaim naming Envirosource, Inc. as a third-party defendant, (Document No. 28), which this Court has construed as a motion to add an additional party pursuant to Federal Rule of Civil Procedure 15(a), and the response by plaintiff IU North America, Inc., as well as the reply, sur-reply and supplemental briefs thereto, and for the reasons in the foregoing memorandum, the motion is hereby **DENIED**.

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LOWELL A. REED, JR., S.J.